

BETWEEN: Jimmy Ben Essau and Family, Philemon Ben
Essau and Family, Chief Ben Essau and
Family and Alickson and Family
Appellants

AND: Freddy Boblang, Willie Kalfatak, William
Kalsauga, Albert Kalangis and Paul Kalsar
Respondents

Date of Hearing: 8 July 2021

Coram: Hon. Chief Justice V. Lunabek
Hon. Justice J. Mansfield
Hon. Justice R. Young
Hon. Justice O. Saksak
Hon. Justice D. Aru
Hon. Justice V.M. Trief

In Attendance: Mr E. Molbaleh for the Appellants
Mr D. Yawha for the Respondents

Date of Judgment: 16 July 2021

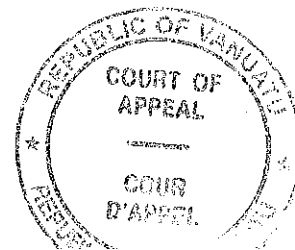
JUDGMENT

A. Introduction

1. This is an appeal against two interlocutory orders (CAC 21/629) and an appeal against the judgment after trial (CAC 21/2213). The appeal in CAC 21/2213 was filed the day before the hearing of the appeal in CAC 21/629. The Court therefore heard the appeal against the interlocutory orders and directed that submissions be filed in relation to CAC 21/2213 which would be heard on the papers. This judgment determines both appeals.
2. The Appellants were the Defendants in the Supreme Court proceeding CC 19/510 (called 'Essau and Families' in this judgment); the Respondents were the Claimants (called the 'lessees' in this judgment).

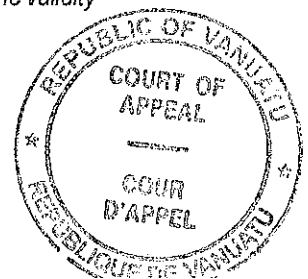
B. Background

3. The primary Judge set out the facts in the final judgment dated 8 March 2021 as follows:
 1. This was an application for eviction.



2. *The Claimants are the lessees of a parcel of land situated at Forari, legally described as leasehold Title No. 12/0741/007. The lessors are Bob Sul Kalfau and Elvis Kalfau. The lease was registered on 26 October 2011.*
3. *The allegation is that the Defendants moved onto the land in 2012. In fact, Chief Davidson Ben Essau in his sworn statement agrees that he and the other Defendants commenced to reside on the land from 9 November 2010.*
4. *There has been previous litigation seeking eviction of the Defendants in 2016. That litigation has been overtaken by this current action, without the Supreme Court making any decision as to the merits of the case.*
5. *The current Claim was filed on 7 March 2019. A Defence was filed on 21 May 2019.*
6. *There have been a number of attempts to hear the case. The first date set for the trial was 16 March 2020. However, that date clashed with a Supreme Court tour to Espiritu Santo. The trial was accordingly moved to 1 April 2020. Mr Boar ceased to act for the Defendants and accordingly the trial date was vacated and the trial deferred to 23 September 2020 to give the Defendants the opportunity to instruct new counsel.*
7. *By Minute dated 1 September 2020, the trial date was confirmed and the Defendants put on notice that the Defence filed was inadequate. It referred to the previous 2016 litigation having been discontinued and that therefore it was no possible for the matter to be re-litigated. The Minute explained that there was no discontinuance and the closure of the previous file was no impediment to the Claimant's application for eviction.*
8. *Mr Molbaleh then commenced acting for the Defendants [on 17 September 2020]¹ and he sought an adjournment due to being unprepared for trial, having only recently received instructions. The trial was accordingly further adjourned to 8 March 2021, with costs imposed due to the lateness of the Defendants' instruction to Mr Molbaleh. The Court understands those costs remain outstanding.*
9. *There then followed 3 applications by Mr Molbaleh on behalf of the Defendants, all at the eleventh hour, given the history of this litigation:*
 - (i) *on 12 February 2021, an application to join Mr Louis Pakoa Manasakau as a Defendant – he apparently wished to assert custom ownership of the land in question;*
 - (ii) *on 12 February 2021, an application to also join Family Manasakau as a Defendant – the family similarly wished to assert custom ownership; and*
 - (iii) *on 24 February 2021 an urgent application for leave to file an amended defence and counterclaim, now challenging the validity of the Claimants' lease.*

¹ [our insertion]



10. *The applications were all declined for reasons explained at the time. Wasted costs of VT5,000 were ordered in respect of the third application, but have also yet to be paid.*

C. The Appeal against the Interlocutory Orders

4. The two interlocutory orders appealed against are:
 - a. Orders dated 17 February 2021 declining Essau and Families' application seeking to add Family Manasakau as a party; and
 - b. Orders dated 26 February 2021 declining Essau and Families' urgent application for leave to file an amended defence and counterclaim, to challenge the validity of the lessees' lease.

Orders dated 17 February 2021

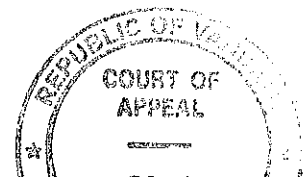
5. The Application sought to add Family Manasakau as a party on the ground that Family Manasakau had a review application pending before the Island Court (Land) over land which included the leased land therefore Family Manasakau wished to argue that the lessees' lease should never have been issued while there was an ongoing custom ownership dispute.
6. The primary Judge stated that the Claim before the Court had nothing to do with custom ownership. The Claim merely asserted that certain individuals are trespassing on the Lease in question. Whether or not that is so was completely unaffected by custom ownership. He declined the Application.

Orders dated 26 February 2021

7. The Application sought leave to file an Amended Defence, Counter Claim and sworn statements on the grounds that there was no counter claim and the amended defence and counter claim need to be supported by sworn statements.
8. The primary Judge took into account that the lease was registered in October 2011 and had not been challenged to date. The Claim was filed on 7 March 2019, almost 2 years from the hearing. In the course of the current litigation, the new allegations had come as a complete surprise and there was no explanation as to why the new allegations were not earlier presented. He held that the Application was simply too late and unfair to the Claimants (the lessees), and dismissed the Application.

Grounds of Appeal

9. Mr Molbaleh submitted on appeal that the primary Judge erred in not properly taking into account the merit of the Applications and in entertaining an eviction claim while the custom ownership dispute was ongoing before the Island Court (Land).



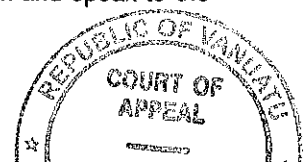
Discussion

10. Dealing firstly with the Orders dated 17 February 2021, the primary Judge was correct in stating that the Claim before the Court had nothing to do with custom ownership. The Claim sought the eviction of certain individuals from the leased land as the lessees have the right to exclusive possession of that land. There was no challenge by way of Counter Claim to the validity of the lessees' lease therefore whether or not custom ownership was disputed had no effect on the Claim for eviction. No error has been made out; the appeal against the Orders dated 17 February 2021 must be dismissed.
11. After the primary Judge made the interlocutory orders dated 17 February 2021, Essau and Families on 24 February 2021 filed an Urgent Application for Leave to File an Amended Defence, Counter Claim and Sworn statements in support (the 'Urgent Application').
12. Mr Molbaleh admitted that he had not included in the Urgent Application or supporting sworn statement any explanation why the Urgent Application was made so late (10 days before trial) nor the content of the proposed amendments to the Defence or the Counter Claim. Mr Molbaleh informed this Court that it would be a claim under s. 100 of the *Land Leases Act* alleging that the lease registration was obtained by fraud or mistake, but admitted that such a claim was not put before the primary Judge.
13. Further, Essau and Families had commenced earlier proceedings, in Civil Case No. 235 of 2011, to challenge the validity of the lease. That proceeding was struck out on 23 May 2013. They brought the same claim in Civil Case No. 289 of 2013. That proceeding was struck out on 2 December 2015. Neither decision has ever been appealed.
14. Mr Molbaleh accepted that given that the earlier proceedings had been struck out, it was even more important that the Application and supporting sworn statements explain why the Urgent Application had not been made earlier. Mr Molbaleh simply failed to put the requisite information in the Urgent Application and supporting sworn statement. Accordingly the primary Judge did not err in making the Orders dated 26 February 2021 and the appeal against those Orders also fails.
15. For the reasons given, the grounds of appeal in CAC 21/629 have not been established and that appeal must be dismissed.

D. The Appeal against the Judgment

The Judgment

16. The primary Judge recorded the background facts, the fact that Mr Molbaleh was absent from Court, that there was also no appearance by any of the Defendants (Essau and Families) and that Mr Molbaleh had not made an application for an adjournment. Further, that Mr Molbaleh had effectively gone behind the primary Judge's back and speak to the



Chief Registrar to request that all Supreme Court Judges excuse Mr Molbaleh from all Court appearances that week due to an urgent personal issue that he had to deal with. The primary Judge stated that the application should have been made before a Judge and that Mr Molbaleh saw the Judge while speaking with the Chief Registrar but made no approach to the Judge. He concluded that as matters stood, this was just a blatant avoidance issue for Mr Molbaleh.

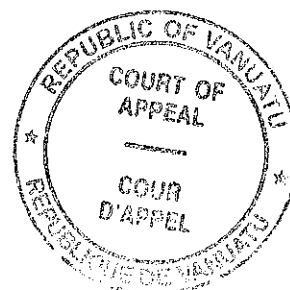
17. Mr Molbaleh also did not respond to emails or telephone calls to his mobile phone and to the messages left that if he or his clients did not appear, the Court could only consider the evidence available, but would conclude the matter that day.
18. As Mr Molbaleh had not given notice to cross-examine the lessees' only witness, the primary Judge dealt with the matter on the papers.
19. The primary Judge considered Mr Kalo Kaleses' evidence producing a copy of the registered lease and Chief Davidson Ben Essau's evidence confirming that the Defendants (Essau and Families) were occupying the land in question. He accepted Mr Kaleses' evidence that the Defendants were not occupying the land by permission or right and held that they had no permission to occupy the land. The primary Judge made the eviction orders sought.

Grounds of Appeal

20. Mr Molbaleh submitted on appeal that the primary Judge erred in:
 - a. Issuing the trespass judgment requiring eviction in favour of the lessees when none of them is or was declared by a competent court or tribunal to be the custom owner of the leased land; and
 - b. By not rectifying the lease in question through cancelling it.

Discussion

21. The Claim sought the eviction of certain individuals. It flowed from the right of the lessees to the exclusive possession of the leased land. Whether or not any of the lessees was a declared custom owner of the leased land is not a matter relevant to a claim in trespass either for the lessees to prove or that would be a basis to defend such claim. Accordingly, the primary Judge did not err as alleged.
22. As to the second ground of appeal as we have said there was no claim before the Supreme Court seeking rectification of the lease and so no error shown in not considering rectification.
23. These grounds of appeal fail and the appeal in CAC 21/2213 must be dismissed.



E. Result and Decision

24. The appeal in CAC 21/629 against the interlocutory orders dated 17 and 26 February 2021 is dismissed.
25. The appeal in CAC 21/2213 against the judgment dated 8 March 2021 is dismissed.
26. Costs should follow the event. The Appellants are to pay the Respondents' costs of the appeals which we fix at VT50,000.

DATED at Port Vila this 16th day of July 2021

BY THE COURT

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**Hon. Chief Justice
Vincent Lunabek**

